Supreme Court, U.S.
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No. 96-14

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IVAN ANDRICK AND HELEN ANDRICK,
Petitioners,
v.
POOL ENERGY SERVICES CO. AND RON G. HALE
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment for the employer is appropriate in an age discrimination case brought under the ADEA in which the discharged employee has set forth evidence to support a *prima facie* case, but has failed to present evidence to establish that the legitimate, non-discriminatory business reason for the discharge proffered by the employer is false and pretextual, or that the discharge was motivated by age discrimination.

2. Whether the exception to the employment at will doctrine in Texas established by *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 773 (Tex. 1985), prohibiting discharge of an employee for refusal to commit an illegal act, should be extended to a case in which the employee voluntarily resigns and alleges that he was constructively discharged for refusal to engage in a criminal conspiracy.

LIST OF ALL PARTIES

PETITIONERS:

IVAN ANDRICK
HELEN ANDRICK

RESPONDENTS:

POOL ENERGY SERVICES CO.
RON G. HALE

LIST OF AFFILIATED CORPORATIONS:

POOL ENERGY SERVICES CO. HAS NO PARENT COMPANIES OR NON-WHOLLY OWNED SUBSIDIARIES

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The Opinions and Decisions of the United States Court of Appeals for the Fifth Circuit are enclosed and printed as Appendices B and C. The Opinion and Decision of the United States District Court for the Southern District of Texas is enclosed and printed as Appendix A.

BASIS FOR JURISDICTION

1. Petitioner incorrectly asserts that jurisdiction is conferred on the Court by 28 U.S.C. § 1291. The basis for this Court's exercise of jurisdiction is 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the District Court and United States Court of Appeals for the Fifth Circuit

The district court granted Defendants' Motion for Summary Judgment on Ivan Andrick's age discrimination claim, specifically ruling that while Plaintiff Ivan Andrick presented sufficient evidence to raise a fact issue to establish a *prima facie* case, Defendants presented legitimate, non-discriminatory reasons for the discharge, and Plaintiff failed to provide any evidence to establish that there is a fact question concerning pretext. (Appendix A, p. 5a) The district court's opinion was affirmed without further written opinion by the Fifth Circuit. (Appendix B, p. 13a) Petitioner has incorrectly stated the issue which could be considered by the Supreme Court by implying incorrectly that the district court found evidence of pretext.

The district court granted Defendants' Motion for Judgment on the Pleadings, dismissing Plaintiffs' claim for wrongful termination at common law as a matter of law

because Andrick alleges that he involuntarily resigned from his position in Tunisia after he became aware of an alleged fraudulent tax practice conducted by Pool in Tunisia. The district court correctly ruled that "the Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination." (Appendix A, p. 11a)

Plaintiff Ivan Andrick's age discrimination claim arose out of his employment in Oman. Mr. Andrick was employed by Intairdril Oman L.L.C., an Oman company 49% of which is owned by an indirect subsidiary of Defendant Pool Energy Services Co. ("Pool"), and 51% of which is owned by Muscat Trading Company, an Oman company not otherwise affiliated with Pool, prior to his employment termination on March 31, 1993. Mr. Andrick's direct supervisor prior to his employment termination was Defendant Ron G. Hale ("Hale"). On September 27, 1993, Ivan Andrick filed charges with the Equal Employment Opportunity Commission ("EEOC"), alleging that Pool discriminated against him in terminating his employment because of his age. On February 11, 1994, Ivan Andrick and his wife, Plaintiff Helen Andrick, sued Defendants Pool and Hale in state court, each asserting claims for alleged age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful termination with the intention of denying pension benefits, allegedly arising

out of the employment termination of Ivan Andrick on or about March 31, 1993. (R. 1, at p. 13)[1]

On March 17, 1994, Defendants removed this case to federal court after timely answering in state court. (R. 1, at p. 19) Defendants filed their First Amended Answer specifically denying all claims by Plaintiffs Ivan Andrick and Helen Andrick and raising various affirmative defenses. (R. 35, at p. 411) In August 1994, Pool offered Ivan Andrick reemployment in Tunisia. Ivan Andrick accepted reemployment but subsequently resigned. On March 17, 1995, Ivan Andrick and Helen Andrick filed their Motion for Leave to Amend, seeking to amend their complaint to add a cause of action for wrongful termination at common law, alleging that Ivan Andrick was constructively discharged from his employment in Tunisia for refusing to commit an illegal act. (R. 50, at p. 1287) On April 13, 1995, the Court granted Plaintiffs' Motion for Leave to Amend, allowing them to add the additional cause of action for wrongful termination at common law. (R. 63, at p. 1433)

On February 27, 1995, Defendants filed their Motion for Summary Judgment, asking the court to grant summary judgment on all claims asserted by Plaintiffs against Defendants in their Original Petition. (R. 40, at p. 706) On May 9, 1995, the Defendants filed their Motion for Judgment on the Pleadings, seeking judgment as a matter of law on Plaintiffs' cause of action for wrongful termination at common law as asserted in their First Amended Petition. (R. 69, at p. 1468) On May 31, 1995, the district court granted

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[1]Citations to the Record on Appeal will utilize the docket item numbers assigned by the district court clerk, followed by the relevant page number in the record. Thus, for instance, a citation to docket item number 13, record page number 56, would appear "(R. 13, at p. 56)."

Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings. (R. 71, at p. 1484)

The district court granted Defendants' Motion for Summary Judgment on Ivan Andrick's cause of action for age discrimination, on the grounds that Defendants established a legitimate, non-discriminatory reason for their decision to terminate Ivan Andrick's employment in Oman, and the Plaintiffs failed to tender factual evidence that would lead a jury to conclude that the employer's reasons are a pretext for age discrimination. The district court specifically found that "Andrick has provided no factual evidence to establish that there is a fact question concerning pretext." (Appendix A, p. 5a) The district court granted judgment on the pleadings on Ivan Andrick's Texas common law claim for wrongful termination of his employment in Tunisia asserted under the exception to the at-will doctrine recognized by the Texas Supreme Court in *Sabine Pilot*, because Ivan Andrick pled that he resigned from his position and was not terminated, and cannot as a matter of law pursue a cause of action for wrongful termination. (Appendix A, p. 5a)

B. Statement of Facts Regarding Ivan Andrick's Employment

Defendant Pool Energy Services Co. has no employees. (R. 40, at p. 501) It is the legal entity owner of Pool Energy Holding, Inc., which owns Pool Company. (R. 40, at p. 501) In May 1962, Mr. Andrick began his employment with a company which was subsequently acquired by Pool Company. (R. 40, at p. 501) He was since then, through March 31, 1993, continuously employed with affiliates of Pool Company. (R. 40, at p. 501) Hale, as Group Vice President--International Operations for Pool, was Ivan Andrick's employment supervisor from June 1989,

until his employment termination in March 1993. (R. 40, at p. 648, § 2) From November 1989 through March 1993, Mr. Andrick was employed as area manager of Intairdril Oman L.L.C. (R. 40, at p. 648, § 2) Intairdril Oman L.L.C. is in the business of oil well servicing and workovers, and air drilling operations. (R. 40, at p. 597)

Pursuant to his request, Mr. Andrick was awarded the position of area manager of Intairdril Oman L.L.C. by Hale in late 1989, when a vacancy occurred. (R. 40, at pp. 597-598) Ivan Andrick was not promised at any time that his employment would be continued for any specific length of time. (R. 40, at pp. 589-590)

The primary business of Intairdril Oman L.L.C. while Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("PDO Contract"). (R. 40, at p. 647, § 3; R. 40, at p. 595) This contract was terminated December 31, 1992. (R. 40, at p. 647, § 3; R. 40, at p. 585) Due to the loss of the PDO Contract, the company's operations in Oman essentially ceased, and only a skeletal staff of employees remained for the purpose of maintaining customer contacts in Oman and possibly obtaining new business. (*Id.*) The PDO Contract had been "the life of" Intairdril Oman L.L.C. (R. 40, at p. 586)

As area manager over the Oman operations, Mr. Andrick made the recommendations concerning winding down of operations in Oman. (R. 40, at pp. 584, 581-583, and 531-539) In Mr. Andrick's November 1992 written recommendations to Hale concerning winding down of operations in Oman, Mr. Andrick recommended that Russell Alexander, date of birth March 5, 1955, be retained as a field superintendent on resident status. (*Id.*)

Mr. Alexander's employment position prior to termination of Mr. Andrick's employment was also field superintendent, but his position was to be changed to a resident status. (R. 40, at p. 647, § 4) Mr. Andrick's recommendation was accepted, and a resident superintendent position was created coincident with the elimination of the area manager position held by Ivan Andrick. (*Id.*)

Russell Alexander, as field superintendent, did not have the same responsibilities subsequent to Mr. Andrick's employment termination as Mr. Andrick had held as area manager. (R. 40, at p. 647, § 5) Mr. Andrick's annual base salary as area manager, with area differential and cost of living allowance, totalled $97,440, 35% higher than Mr. Alexander's $63,118. (R. 40, at p. 500, § 3; *see* R. 40, at p. 577) The operational revenues for the Oman operations and operations managed from Oman averaged $1,099,500 per month in 1990, $1,067,833 per month in 1991, $759,000 per month in 1992, and in March 1993, the final month of Mr. Andrick's employment, such revenues were $105,000. (R. 40, at p. 500, § 3) The Oman operations employed a total of 99 people at the end of January 1993, and a total of 15 people in September 1993. (*Id.*)

The decisions with respect to staffing in Oman were necessitated by the loss of contracts and were made for sound business reasons. (R. 40, at p. 647, § 6) Mr. Andrick concedes that the elimination of the position of area manager of Intairdril Oman L.L.C. was the correct decision. (R. 40, at pp. 575-576) Mr. Alexander was offered and accepted the resident superintendent position, which was not the same level position held by Mr. Andrick as area manager. (R. 40, at p. 578) Ivan Andrick further told the Texas Employment Commission under oath that his employment was terminated because of "the lost contract with PDO and no position available"; he said nothing about such termination being because of his age. (R. 40, at pp. 549-550, and p. 530)

Ivan Andrick's employment was terminated by Hale, as Vice President of International Operations and his direct supervisor, effective March 31, 1993, for the reason that the position of area manager was eliminated due to the loss of the PDO Contract, and the fact that there was no suitable position available elsewhere in the company. (R. 40, at p. 647, § 6) Hale made the decision to terminate Mr. Andrick's employment. (*Id.*) Age played no factor in the decision to terminate Ivan Andrick's employment. (*Id.*)

Ivan Andrick admitted in his deposition that neither Hale nor any Pool employee ever promised that he would be transferred to another position when his position of area manager in Oman was eliminated. (R. 40, at pp. 573-574)

Ivan Andrick asserts to the Court that he should have been considered for jobs in Tunisia, Italy, Ecuador, Malaysia, and Alaska. The positions for which Mr. Andrick alleges he should have been considered in Italy and Tunisia would be under the supervision of Frank Schirmacher, Regional Vice President, Europe, for Pool. (R. 40, at p. 499, § 2) Pursuant to Hale's request, Frank Schirmacher did consider Ivan Andrick for the opening caused through the departure of John Joy in Tunisia, as well as for the position of general manager in Italy. (R. 40, at p. 499, § 2) The Tunisia job was not awarded to Mr. Andrick due to the fact that the company was very close to the end of its contract with KUFPEC, its customer at that time, and it was felt to be more effective to let another existing employee, Alan Porter, phase that operation out as he had already run the Tunisia operation prior to the arrival of John Joy. (*Id.*)

In Italy, in early 1992, the company had concerns regarding the performance of Steve Carlson. However, by late 1992, Steve Carlson had done an excellent job rebuilding his and the company's image with the customer, and because

of this fact, plus the fact that operations in Italy were decreasing with the loss of a rig contract in March 1993, Steve Carlson was retained in his position in Italy to wind down the operation, thus not creating an opening for Ivan Andrick in Italy. (R. 40, at pp. 498-499, § 2) Pool currently no longer has operations in Italy. (R. 40, at p. 498).

In the case of both the Tunisia and Italy operations, contract duration and decreasing operations without future contracts were the reasons for deciding not to select Ivan Andrick to fill these positions. (R. 40, at p. 498, § 4) Ivan Andrick's age played no factor in the decision not to select him to fill positions in Tunisia and Italy. (R. 40, at p. 498 § 4; R. 40, at p. 647, § 6).

Hale made the decision to select another existing employee, Steve Orso, to fill the position of manager in Ecuador. (R. 40, at p. 646, § 7) Steve Orso's date of birth is 8/18/35, and he is 60 years old. (R. 40, at p. 500, § 4) Steve Orso was awarded the Ecuador position because he was more qualified and experienced in the area of drilling and down-hole technology than Mr. Andrick. (R. 40, at p. 646, § 7) Ivan Andrick does not contest the fact that Steve Orso was qualified for the position in Ecuador. (R. 40, at p. 571)

In being awarded the position in Ecuador, Steve Orso vacated his position of general manager and managing director of a Pool affiliate in Malaysia. (R. 40, at p. 646, § 7) Kerry Kunz, the operations manager in Malaysia prior to Steve Orso's transfer, remained in the position of operations manager upon Steve Orso's transfer when Mr. Orso's position was eliminated, because Kerry Kunz was doing a good job and the client was happy with his performance. (*Id.*) Kerry Kunz was later on June 1, 1994,

promoted to general manager. (*Id.*) Steve Carlson was transferred from Italy to Malaysia also on June 1, 1994, as operations manager. (R. 55, at p. 1356)

Prior to Mr. Andrick's employment termination, Hale also checked with Bill Myers, Pool's Vice President of U.S. Operations, and Nick Petronio, Vice President of U.S. Land Operations, concerning employment opportunities in the domestic operations for Ivan Andrick, and was informed that there were no positions available for Mr. Andrick to assume. (R. 40, at p. 646, § 8; R. 58, at p. 1409, § 2) No position was available in Alaska prior to Ivan Andrick's employment termination.[2] (R. 58, at pp. 1408-1409) As such, Hale made the decision to terminate Mr. Andrick's employment effective March 31, 1993. (R. 40, at p. 647, § 6)

In September 1994, Plaintiff Ivan Andrick was offered and accepted the position of area manager in Tunisia, and was again employed by a company indirectly owned by Pool. (R. 40, at p. 646, § 9) The decision to select Ivan Andrick for the position of area manager in Tunisia was made by Hale. (*Id.*)

After Defendants filed their Motion for Summary Judgment on all claims raised in Plaintiffs' Original Petition, Ivan Andrick quit his job in Tunisia, and filed an Amended Petition, asserting that he "involuntarily resigned" because he

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[2]At the time of Ivan Andrick's employment termination effective March 31, 1993, Pool's general manager in Alaska was Kenneth V. Huseman. (R. 58, at p. 1409) Mr. Huseman later resigned this position by letter of resignation dated April 21, 1993, which became effective April 22, 1993. (*Id.*) As such, the Alaska position was not available at the time of Mr. Andrick's employment termination. (R. 58, at p. 1408) Furthermore, this position was filled by Dale Larsen, date of birth 6/28/44, a person in a protected class based on his age. (R. 58, at pp. 1408-1409)

was asked to report tax information to the Tunisian government, which he claims would be a violation of Tunisian law. (R. 65, p. 1438) Mr. Andrick claims that the conduct he was asked to commit was part of a "longstanding scheme by Defendant to defraud the government of Tunisia of its employees' income taxes." (*Id.*) Contrary to Petitioner's statements in his Petition for Writ of Certiorari, Plaintiffs did not plead that the conduct Mr. Andrick was allegedly ask to commit was in violation of United States law; only that it was a violation of *Tunisian* law.

REASONS FOR DENYING THE WRIT

A. The District Court Correctly Ruled that Defendants Provided Legitimate, Non-Discriminatory Reasons for Mr. Andrick's Discharge, and that no Evidence of Pretext has been Presented by Petitioner

The burden of proof for an Age Discrimination and Employment Act ("ADEA") disparate treatment claim proceeds through the same shifting analysis as used in a Title VII case that requires: (1) the plaintiff must demonstrate a *prima facie* case of discrimination; (2) the employer must then articulate a legitimate, non-discriminatory reason for its disputed action; and (3) the plaintiff must prove that the employer's asserted reason was merely a pretext for intentional discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). The United States Supreme Court recently reemphasized that the plaintiff *always* has the burden of proving intentional discrimination by the employer. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *see also Burdine*, 450 U.S. at 252-53 ("the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

In order to establish a *prima facie* case under the ADEA, Ivan Andrick must prove that: (1) he was a member of a protected age group (40 years or older); (2) he was qualified to perform his job; (3) he was discharged; and (4) he was replaced by someone outside of the protected class or was otherwise discharged because of his age. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (affirming summary judgment for employer); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir.), *cert. denied*, 114 S. Ct. 467 (1993) (affirming summary judgment for employer). The district court found that Ivan Andrick has presented evidence which is sufficient to establish a *prima facie* case of age discrimination.

If it is determined that the Plaintiff has established a *prima facie* case of discriminatory discharge, Defendants must then set forth admissible evidence showing the legitimate, non-discriminatory reason for Plaintiff's employment termination. At this second stage of the disparate treatment analysis, Pool and Hale must produce evidence that Ivan Andrick was "rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983). "[T]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center*, 509 U.S. 502, 507 (1993) (citations omitted). At this stage, to satisfy their burden of production, the defendants "need only articulate a lawful reason, regardless of what its persuasiveness may or may not be." *Bodenheimer*, 5 F.3d at 958. Pool and Hale set forth for the court evidence which showed that Defendants terminated Ivan Andrick from his position as area manager in Oman for the legitimate, non-discriminatory reasons that the position of

area manager was eliminated due to the loss of the major contract which provided the bulk of business for Ivan Andrick's employer and there was no suitable position available elsewhere in the company, and not because of his age.

Ivan Andrick's employment was terminated after Intairdril Oman L.L.C. lost the PDO Contract and therefore lost the bulk of its business, and not because of Mr. Andrick's age. (R. 40, at p. 647, § 6) Plaintiff has admitted in his deposition that the decision to eliminate his position of area manager was the correct decision. (R. 40, at pp. 575-576) In fact, Ivan Andrick made the recommendations concerning the minimal staffing to be retained in Oman, including leaving Russell Alexander in the position of field superintendent to be the most senior person remaining in Oman. (R. 40, at pp. 584, 581-583, and 531-539)

Furthermore, Ivan Andrick was not given another position within the company as no suitable position was available. (R. 40, at p. 647, § 6) He was not put in Ecuador because Steve Orso, then age 57, was believed by Hale to be more qualified for that position because he was more qualified in the area of drilling and down-hole technology than Mr. Andrick. (*Id.*) Upon being awarded the position in Ecuador, Steve Orso vacated his position of general manager and managing director of ADSB, Pool's affiliate in Malaysia. Kerry Kunz, the operations manager in Malaysia prior to Mr. Orso's transfer, remained in the position of operations manager upon Mr. Orso's transfer when Mr. Orso's position was eliminated, because Mr. Kunz's performance was good and the client was happy with his performance. (*Id.*) On June 1, 1994, more than a year after Ivan Andrick's employment was terminated, Mr. Kunz received the title of general manager. (*Id.*)

Ivan Andrick was not put in Italy because no position opened up in Italy because Steve Carlson succeeded in rebuilding his and the company's images, and the operations in Italy were decreasing, so the decision was made not to remove Steve Carlson from the position he held. (R. 40, at pp. 498-499) Ivan Andrick was not put in Tunisia in 1993 because the contract then in effect there was getting close to the end, and it was believed to be more effective to allow Alan Porter, who had experience running the Tunisia operations, to phase that operation out. (R. 40, at p. 499)

Hale checked with Bill Myers, Vice President of U.S. Operations, and Nick Petronio, Vice President of U.S. Land Operations, and was informed that there were no positions available for Mr. Andrick to assume in the domestic operations. (R. 40, at p. 646, § 8) There was no position available in Alaska to assume prior to Ivan Andrick's employment termination. (R. 58, at pp. 1408-1409) Therefore, Ivan Andrick's employment was terminated by Hale effective March 31, 1993, for the legitimate non-discriminatory reason that his position was eliminated due to the loss of the PDO Contract, and there was no other suitable position available, and not because of his age. (R. 40, at p. 647, § 6)

Even if Plaintiff is able to establish a *prima facie* case, upon production by the employer of evidence showing a legitimate, non-discriminatory reason for the employer's decision, without evidence of pretext, summary judgment is appropriately granted for the employer. *Grisby v. Reynolds Metals Co.*, 821 F.2d 590 (11th Cir. 1987). Pretext means pretext for intentional age discrimination. "To show that the defendants' proffered reason was a pretext for [age] discrimination [the employee] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for the defendants'

action." *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994). "[I]n ADEA cases a court considering summary judgment must decide whether plaintiff's facts, if believed, would prove that, more likely than not, the employer fired the employee because of his age." *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 (5th Cir. 1993). The plaintiff must show that his age was a determining factor, not merely a contributing factor, in his discharge. *Carolan v. Central Freight Lines, Inc.*, 489 F. Supp. 941, 944 (E.D. Tex. 1980); *Cunningham v. Central Beverage, Inc.*, 486 F. Supp. 59, 61 (N.D. Tex. 1980). "[A] jury issue will be presented and a plaintiff can avoid summary judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996). Substantial evidence, and not merely a scintilla of evidence, is required to create a jury question. *Rhodes*, 75 F.3d at 993.

The district court clearly correctly found that, "Andrick has provided no factual evidence to establish that there is a fact question concerning pretext." Ivan Andrick has not shown and cannot show that the legitimate, non-discriminatory reasons put forth by Defendants for selecting him for employment termination are pretext to mask intentional discrimination.

Ivan Andrick's own unsubstantiated theory concerning discrimination has been eliminated by specific facts. Mr. Andrick's assertion that he was qualified for other positions within the company shows no pretext for age discrimination. Defendants clearly set forth the legitimate, non-discriminatory reasons why Ivan Andrick was not

selected for positions in Tunisia, Italy, Ecuador, Malaysia, and Alaska. Mr. Andrick provided no evidence which would call into dispute the legitimate, non-discriminatory reasons set forth by Defendants for selecting other employees of the company to assume or to remain in these positions. Again, Kerry Kunz was not promoted to the position of general manager in Malaysia until June 1, 1994, more than a year after Ivan Andrick's employment was terminated. (R. 40, at p. 646 § 7) As shown by the employment records submitted by Plaintiffs as an exhibit to their Response to Defendants' Motion for Summary Judgment, Steve Carlson was not transferred from Italy to Malaysia until June 1, 1994, again more than a year after Ivan Andrick's employment was terminated. (R. 55, at p. 1356) Furthermore, when Ivan Andrick's employment was terminated effective March 31, 1993, no position was available in Alaska. (R. 58, at p. 1409) The position of general manager in Alaska was held by Kenneth V. Huseman. (R. 58, at p. 1409) Mr. Huseman resigned this position by letter of resignation dated April 21, 1993, which became effective April 22, 1993. (R. 58, at p. 1409) As such, the Alaskan position ***was not available*** at the time of Ivan Andrick's termination. Therefore, failure to consider Mr. Andrick for this position which was not available is no evidence of age discrimination. Furthermore, this position was filled by Dale Larsen, date of birth 6/28/44, a person also in a protected class based on his age. (R. 58, at pp. 1408-1409).

The district court correctly found that, "concerning the other positions in the various countries in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for

Andrick and [t]his Court will not second guess the business decisions of the defendants." (Appendix A, p. 5a)

Plaintiff's subjective belief that he was selected for termination of employment because of his age is not sufficient to raise an issue of pretext when Defendants have presented proof of an adequate non-discriminatory reason for his discharge. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985); *Elliott v. Group Medical and Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). It is the perception of the decision maker which is relevant, and Plaintiff's own subjective personal judgments of his skills or qualifications do not raise a genuine issue of material fact. *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (the question is not whether the employer exercised prudent business judgment, but whether the employee has come forward to refute the articulated, legitimate reasons for his discharge; in this regard, the employee must do more than challenge the judgment of his superiors through his own self-interested assertions); *see also Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1315-16 (5th Cir. 1986). Statements by an employee regarding his subjective belief that his employment was terminated because of his age are insufficient to show pretext in the face of proof establishing an adequate, non-discriminatory reason for his discharge. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435 (5th Cir. 1995); *Molner v. Ebasco Constr., Inc.*, 986 F.2d 115, 119 (5th Cir. 1993). "To make out an ADEA claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age." *Eli Lilly*, 990 F.2d at 819. Mr. Andrick's "bold assertion that one exists . . . simply will not suffice." *Id.*

As the Supreme Court recently stated, "Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper v. Biggins*, 113 S. Ct. 1701, 1706 (1993); *see also Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 647 (5th Cir. 1985) (ADEA not intended to be a vehicle for a judicial second-guessing of business decisions, nor was it intended to transfer the courts into personnel managers). The employer is entitled to summary judgment when the evidence considered as a whole is insufficient to allow a jury to infer that age was the actual reason for the discharge. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996).

The only additional "facts" put forth by Mr. Andrick to support his age discrimination claim are statements Ivan Andrick alleges were made by Frank Schirmacher, Ivan Andrick's supervisor during his subsequent employment for Pool in Tunisia. Mr. Schirmacher clearly sets forth in his affidavit the legitimate, non-discriminatory reasons for selecting Alan Porter, an existing employee already in Tunisia to phase the operation out, and leaving Steve Carlson in his position in Italy. (R. 40, at pp. 498-499). Mr. Andrick asserts that Frank Schirmacher "admitted that, if Ron Hale had requested him to find a manager's position for Ivan Andrick in Tunisia or Italy at that time, he could and would have done so." Once again, this is simply no evidence of age discrimination and does not call into dispute the fact that other persons were awarded or retained in the positions in Tunisia and Italy, for the legitimate, non-discriminatory reasons set forth by Defendants. Hale is Vice President of International Operations and is Frank Schirmacher's boss. If Mr. Schirmacher was instructed by Hale to ignore an applicant's qualifications for a job and put a less qualified applicant in that position, Mr. Schirmacher

would have had no choice but to do that. As such, this alleged statement by Mr. Schirmacher put forth by Ivan Andrick does not show that the legitimate, non-discriminatory reasons for selecting employees other than Mr. Andrick for the Tunisia or Italy positions were pretextual, and does not show that the real reason that Ivan Andrick was not given these positions was because of his age.

Petitioners assert that this Court should consider this case to resolve perceived differences in the circuits in the application of the standard for summary judgment when faced with evidence of pretext. However, in this case, there *is no evidence of pretext*. As such, the question Petitioners would like the Court to address as to whether a plaintiff needs to present additional proof of age discrimination on top of substantial evidence of pretext cannot be reached.

Defendants have clearly established that Ivan Andrick's age played no role in the decision to select him for employment termination. The district court properly found that Defendants have provided legitimate, non-discriminatory reasons for eliminating Mr. Andrick's position in Oman and for not placing Ivan Andrick in another position and that Ivan Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. As such, Respondents request that this Court deny Petitioners' request for issuance of Writ of Certiorari on Ivan Andrick's claim for age discrimination.

B. It is Undisputed that Texas has not Established a Cause of Action for Wrongful Termination at Common Law When an Employee Voluntarily Resigns and is not Terminated.

The district court correctly dismissed Ivan Andrick's Texas common law claim for wrongful termination because Ivan Andrick was not terminated, but rather voluntarily resigned from his employment in Tunisia, and therefore cannot state a claim for wrongful termination. After Defendants filed their Motion for Summary Judgment on all of Plaintiffs' claims asserted in their Original Petition, Plaintiffs filed their Amended Petition, adding a cause of action for "wrongful termination at common law." (R. 65, at pp. 1436-1440). In support of this cause of action for wrongful termination at common law, Plaintiffs added paragraph 12 on page 3 on their Amended Petition, asserting that:

> After assuming his duties as manager of the defendant's operations in Tunisia, Mr. Andrick became aware of a long-standing scheme by defendant to defraud the government of Tunisia of its employees' income taxes. Specifically, the defendant deliberately understated the salaries of its employees to the Tunisian government in order to avoid paying significant tax on that income. When Mr. Andrick became aware of this, he protested to his supervisors who ordered him to continue to participate in the scheme. Mr. Andrick protested. To continue any participation in the scheme would subject plaintiff to substantial jeopardy from the government of Tunisia including imprisonment. Because this scheme continued

> over plaintiff's protests, his continued employment became intolerable to any reasonable person. As a consequence, Mr. Andrick involuntarily resigned and returned to the United States.

(R. 65, at p. 1438)

In 1985, the Texas Supreme Court carved out a narrow exception to the employment-at-will doctrine, allowing pursuit of a cause of action for wrongful termination at common law under very limited circumstances. The *Sabine Pilot* exception states:

> We now hold that public policy as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine . . . that narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no other reason than his refusal to perform an illegal act.

Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985). Texas courts have interpreted this exception very literally and very narrowly. *See Medina v. Lanabi, Inc.*, 855 S.W.2d 161, 164 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (noting that this is an "extremely narrow exception"); *Burt v. City of Burkburnett*, 800 S.W.2d 625, 627 (Tex. App.--Fort Worth 1990, writ denied) (same). The Texas supreme court has subsequently limited the exception

to situations where the employee is "unacceptably forced to choose between risking criminal liability or being discharged from his livelihood." *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 724 (Tex. 1990).

On the face of his Amended Petition, Mr. Andrick clearly pled that he was not terminated from his position of employment in Tunisia, but rather that he "involuntarily resigned." (R. 65, p. 1438) No Texas case has recognized the availability of a cause of action for wrongful termination under common law under the *Sabine Pilot* exception upon alleged constructive discharge, as opposed to actual termination. Under the current state of Texas law, the employer must take affirmative steps to discharge the employee.

The case cited to this court by Plaintiffs, *Higgenbotham v. Allwaste*, 889 S.W.2d 411 (Tex. App.--Houston [14th Dist.] 1994, writ denied), does not recognize a cause of action for wrongful termination under *Sabine Pilot* absent the firing of the employee. In *Higgenbotham*, the employee was fired. *Higgenbotham* did not even address the issue of whether a constructive discharge could be actionable under *Sabine Pilot*, as it was clear to the court that under both *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) and *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990), that a firing must occur. *Higgenbotham*, 889 S.W.2d at 413. At issue in *Higgenbotham* was whether the threat to fire must necessarily accompany the request to perform the illegal act, or, if an employee who is ordered to do the illegal act and refuses and ***is subsequently fired*** can still show that the sole reason for his termination was his refusal to commit an illegal act. *Id.* (emphasis added). It is not the case that every employee who is asked to perform an illegal act by his employer will be fired if he refuses. To allow an employee to quit and sue

his employer at any time on the basis of an alleged request to perform an illegal act would destroy the employment-at-will doctrine.

The Texas Supreme Court in *Winters* discerned the two essential elements of the exception: (1) an order to engage in a criminal act; and (2) discharge for failing to do so. *Winters*, 795 S.W.2d at 724. The Court in *Sabine Pilot* noted that the refusal to perform the illegal act must be the sole reason for ***termination***. 687 S.W.2d at 735. *See also Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 953 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995); *Paul v. P.B.-K.B.B., Inc.*, 801 S.W.2d 229, 230 (Tex. App.--Houston [14th Dist.] 1990, writ denied). As Mr. Andrick clearly pleads in his Amended Petition that he was not terminated by Defendants, but rather resigned, he may not recover for wrongful termination under the *Sabine Pilot* exception to the employment-at-will doctrine in Texas, and judgment on the pleadings was properly granted. (R. 65, p. 1438) Furthermore, Defendants also correctly asserted to the district court that judgment on the pleadings would also be properly granted on Ivan Andrick's cause of action for wrongful termination at common law because Ivan Andrick pled only that the conduct would violate Tunisian law, and not a Texas or United States criminal law, as required by *Sabine Pilot*.

It is undisputed that the Texas Supreme Court has not extended the *Sabine Pilot* doctrine to create a cause of action for wrongful discharge when an employee resigns and alleges constructive discharge and is not actually terminated by the employer. A federal court is not free to engraft on to state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State of Texas. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). A

federal court may act as a judicial pioneer when interpreting the United States Constitutional and federal law. *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993). However, federalism concerns require a federal court to leave to the state courts the task of expanding or restricting state common law. *Id.* Absent some authoritative signal from the legislature or the state courts, a federal court has no basis for even considering the pros and cons of innovative theories. *Id.* (quoting *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988)). As such Writ of Certiorari should not be granted to consider whether Texas common law should be modified and expanded to include a cause of action for wrongful discharge when an employee voluntarily resigns after allegedly being asked to commit conduct which is a violation of a foreign law.

CONCLUSION AND PRAYER

Ivan Andrick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IVAN ANDRICK AND HELEN ANDRICK,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. H-94-893
POOL ENERGY SERVICES CO., ET AL.,	§	
Defendants.	§	

ORDER

Pending before the Court is the Motion for Leave to File Motion for Summary Judgment in Excess of the Page Limits (Document #39) filed by defendants Pool Energy Services Company ("Pool") and R.G. Hale ("Hale"), the Motion for Summary Judgment (Document #41) filed by Pool and Hale, and the Motion for Judgment on the Pleadings (Document #69) filed by Pool and Hale. Having considered the motions, submissions, and applicable law, the Court determines that these motions should all be granted.

Plaintiffs Ivan Andrick and Helen Andrick filed their original petition in state court alleging causes of action for age discrimination, intentional infliction of emotional distress, fraud, conspiracy to defraud, and unlawful

termination with the intent to deny pension benefits after Ivan Andrick was terminated from employment on March 31, 1993. Defendants removed this action to this Court pursuant to federal subject matter jurisdiction on March 17, 1994. In September, 1994 Pool offered Ivan Andrick a position with the company in Tunisia in September 1994 which he accepted. Subsequently, Ivan Andrick resigned from that position and filed an amended complaint in this case alleging a cause of action for wrongful termination for refusal to commit an illegal act in connection with his employment in Tunisia.

The undisputed facts in this case are that in May 1962, Ivan Andrick began his employment with a company which was subsequently acquired by Pool. From 1962 until March 31, 1993 Ivan Andrick was continuously employed with affiliates of Pool. From 1989 through March 1993, he was employed by Intairdril Oman L.L.C., an Oman company which was 49% owned by an indirect subsidiary of Pool. The primary business of Intairdril Oman L.L.C. while Ivan Andrick was in its employment was derived from a contract in place with Petroleum Development Oman L.L.C. ("P.D.O."). On December 31, 1992, this contract was terminated necessitating the eventual cessation of Pool's operations in Oman. As area manager in Oman, Ivan Andrick was responsible for organizing the scaling down operations. Ivan Andrick's supervisor was Hale. Russell Alexander ("Alexander") was placed into the position of resident superintendent by Ivan Andrick to complete the cessation operations in Oman. At the time, Alexander was 37 years old.

Thereafter, Ivan Andrick was terminated from employment. Andrick argues that Hale assured him that he would be placed in a different position with the company in either Italy, Ecuador, Tunisia, Malaysia, or the United

States. Andrick further argues that the company had always placed him in another position after the completion of an operation and that he had no reason to expect otherwise in this instance.

Pool and Hale filed the instant motions arguing that all of the plaintiffs' causes of action should be dismissed as they cannot establish a genuine issue of material fact necessary to sustain the claims. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. of Civ. Proc. 56(c). Thus, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also State Farm Life Ins. Co. v. Guttermann*, 896 F.2d 116, 118 (5th Cir. 1990).

Defendants argue that Ivan and Helen Andrick's claim of age discrimination should be dismissed. Plaintiffs filed the age discrimination cause of action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq*. Pursuant to the ADEA, in order to establish a prima facie case of age discrimination, a plaintiff must establish: (1) that he/she was discharged; (2) that he/she was qualified for the position; (3) that he/she was within the protected class at the time of the discharge; (4) that he/she was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of age. *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). If the plaintiff meets these requirements, there is a presumption of discrimination which

the defendant must rebut by articulating a legitimate non-discriminatory reason for the discharge. *Id.* If the employer successfully rebuts the presumption of age discrimination, the employee's prima facie case dissolves. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). The plaintiff then has the burden of establishing that the proffered reasons, as stated by the employer are not the real reasons for the discharge but are pretextual. However, not only must the plaintiff establish that the employer's stated reasons are pretextual, but are pretextual for *age discrimination.*

In the instant case, Ivan Andrick argues that the Court should consider not only the position in Oman, but the various positions in other countries in which Pool operated, (such as Malaysia, Ecuador, Italy, Alaska, and Tunisia) in determining whether he has established a prima facie case of age discrimination. The Court determines that Ivan Andrick has established a prima facie case for age discrimination pursuant to the aforementioned factors. However, Helen Andrick has failed to establish a prima facie case for age discrimination as she has not demonstrated that she was ever employed or discharged by the defendants. Thus, Helen Andrick's ADEA claims are properly dismissed.

Having established a prima facie case of age discrimination, Pool and Hale have provided legitimate, non-discriminatory reasons for their decision to terminate Ivan Andrick. First, as the operations in Oman were being terminated, Alexander was placed in a position to wind-down operations. Alexander was receiving approximately 35% less compensation than was Ivan Andrick and was placed in an inferior position. Thus, the decision to retain Alexander in Oman to oversee the cessation operations at a reduced salary than Andrick was receiving, is a legitimate, non-discriminatory reason.

Concerning the other positions in the various countries in which Andrick argues that he could have been placed, the defendants have provided legitimate, non-discriminatory reasons for these decisions based on the experience, abilities, success at building the company's reputation, and the relationship with the clients of the managers in those positions. In sum, the company simply did not have an available position for Andrick and this Court will not second guess the business decisions of the defendants. "The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (1988).

As the defendants have provided legitimate explanations for not placing Andrick in another position, he must prove that the proffered reasons stated are pretexts for age discrimination. At the summary judgment stage, the Court's inquiry is whether the plaintiff has tendered factual evidence that would lead a jury to reasonably conclude that the employer's reasons are a pretext for age discrimination. *St. Mary's Honor Society v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Andrick has provided no factual evidence to establish that there is a fact question concerning pretext. Thus, Ivan Andrick's ADEA claims should also be dismissed.

The defendants argue that Ivan and Helen Andrick's claims for intentional infliction of emotional distress should also be dismissed. The plaintiffs' allege that the defendants' treatment of Ivan Andrick in terminating him after 30 years service and in failing to recognize his contribution to the company constitute a cause of action for intentional infliction of emotional distress. Specifically, plaintiffs' state that Andrick was not recognized for his 30 years of service to the

company, he was summarily fired without prior warning, notice or cause, he was exploited by Hale by having to select and train his "replacement" while being told that there was another position available for him, he was humiliated by his sudden termination, and further embarrassed when Hale invited him to a retirement party in his honor. Helen Andrick alleges that the defendants intentionally caused her emotional distress by depriving her husband of an income and a paycheck that she was accustomed to receiving, causing her embarrassment, having her husband around the house and causing her to do more housework as a result, and being limited in her social activities because her husband was at home all day. See Document #55 (deposition of Helen Andrick).[3] However, she also stated in her deposition that she had enough money to live comfortably on and was receiving retirement benefits from Pool. *Id.*

The elements of the cause of action for intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The issue of whether the defendants' actions were outrageous is a question of law for the Court to determine. See *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993). Outrageous conduct is that which "[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a

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[3] The amended complaint states "[a]dditionally, the defendants knew that Helen Andrick, the wife of Ivan Andrick, was dependent on the income of her husband. Instead of looking forward to retirement and enjoyment of their golden years, these people are faced with the grim and bleak uncertainty of starting a new career at age 64." See Document #65 at 2.

civilized community." *Id.* at 734 (citing the Restatement 2d of Torts, § 46).

As Texas is an at-will state, the act of terminating an employee is in and of itself a legal right of the employer and can not be, by itself, the basis for an allegation of outrageous behavior. *Id.* at 735. In the instant case, none of the actions of the defendants in terminating Andrick constitute outrageous conduct such that would "exceed all possible bounds of decency" and would be "utterly intolerable in civilized community." *Id.* (citations omitted). Defendants acted within their legal rights in terminating Andrick and making the decision not to place him in another position. The resulting consequences of his termination, i.e. feelings of embarrassment, humiliation, and not having a paycheck are all unfortunate effects of a termination and do not in and of themselves constitute outrageous conduct. Furthermore, the company's failure to recognize Andrick's 30 years of service to the company and giving him a retirement party do not, as a matter of law, constitute outrageous conduct. Helen Andrick's allegations that the company caused her humiliation, embarrassment, additional housework, and limited her social activities does not constitute, as a matter of law, "outrageous conduct." Thus, the Court determines that the Andricks' cause of action for intentional infliction of emotional distress should be dismissed.

The defendants also argue that summary judgment is appropriate on plaintiffs' fraud and conspiracy to defraud claims. Ivan Andrick alleges that the defendants fraudulently induced him to select and train Alexander to replace him by falsely informing him that he would be placed in another position and subsequently terminating him. The elements of a cause of action for fraud are: (1) a material representation was made; (2) that it was false or made recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted

upon by the party; (5) that the party acted in reliance upon it; and (6) the party thereby suffered injury. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1993).

In the instant case, Pool lost the contract with PDO necessitating the need for the company to cease operating in Oman. Andrick acknowledges that it was necessary to close the company down. See Document #40, exhibit D (deposition of Ivan Andrick). Andrick also acknowledges that Russell, who was selected and trained by Andrick to oversee the operations in Oman, did not have the same responsibilities that Andrick had, had as area manager in Oman. *Id.* Andrick also acknowledges that as part of his recommendation for closing down operations in Oman that his position be eliminated. *Id.* Finally, Andrick concedes that no one specifically told him that he would be transferred to another position if the area manager position in Oman was eliminated. *Id.* Thus, as a matter of law, Andrick has admitted that there was no material misrepresentation upon which he relied. In selecting and training Alexander to take over the remaining operations in Oman, Andrick was simply doing his job and carrying out what was the best business practice for his employer. The company attempted to place Andrick in another position but at that time, there was nothing available. When an opportunity did become available in September 1994, Hale offered and Andrick accepted the job in Tunisia. Thus, as there was no material misrepresentation made, the plaintiffs' fraud claims should be dismissed.

The elements of a cause of action for conspiracy to defraud include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more fraudulent, overt acts, and (5) damages as the proximate result. *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.--Corpus Christi 1991, no writ). The Court has already determined as a matter of law,

that there is no sustainable cause of action for fraud. Therefore, there cannot be a cause of action for conspiracy to defraud. Furthermore, as a matter of law, a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the activity. *Nelson Radio and Supply Co., Inc. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952). Thus, the cause of action for conspiracy to defraud should also be dismissed.

Plaintiffs' claim of unlawful termination with the intention of denying ERISA benefits should also be dismissed. 29 U.S.C. § 1140 states *inter alia*:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

Ivan Andrick argues that after he was terminated, had the company placed him in a position in the United States, he would have become eligible to receive ERISA benefits to which employees in foreign countries were not entitled. Thus, Andrick is alleging that although he would have accepted a position in any of the various foreign countries where Pool had opportunities and where he would not have been eligible for ERISA benefits, that because one of the places he could have been placed was in the United States, where he would have been eligible for ERISA benefits, that he was terminated to prevent him from obtaining these benefits.

In *Hines v. Massachusetts Mutual Life Ins. Co.*, 43 F.3d 207 (5th Cir. 1995) the Court affirmed the district court's order granting summary judgment in favor of the defendant where the plaintiff challenged the denial of ERISA benefits pursuant to § 1140. The Court stated that "an essential element of a Section 510 claim is proof of defendant's specific discriminatory intent." *Hines*, 43 F.3d at 209. Specific intent is a state of mind as such need not be proved as a fact, but may be inferred from the circumstances of the transaction and actions of the Defendant. *Cupit v. Whitley*, 28 F.3d 532 (5th Cir. 1994). Andrick has failed to provide any summary judgment evidence to support his claim of termination to prevent him from obtaining ERISA benefits, and as such, he had clearly failed to meet his summary judgment burden of establishing a genuine issue of material fact concerning the issue of specific discriminatory intent. In fact, in Andrick's deposition testimony, he admits that he was not terminated to prevent him from obtaining ERISA benefits. See Document #40, exhibit D at 116-17 (Ivan Andrick's deposition).

Helen Andrick's claim for wrongful termination of ERISA benefits should also be dismissed as she was neither a participant nor a beneficiary in any ERISA plan. Helen Andrick argues that she has a community property interest in her husband's recovery. However, as Ivan Andrick has failed to establish a genuine issue of material fact on the wrongful denial of ERISA benefits, Helen Andrick has no such claim.

Finally, plaintiffs have alleged in the amended complaint a cause of action for wrongful termination at common law. The Andricks allege that after Ivan Andrick assumed his duties in Tunisia, he became aware of a long-standing scheme by Pool to defraud the government of Tunisia of its' employees' income taxes. Andrick alleges

that he protested this practice but the scheme continued and as a consequence, he involuntarily resigned and returned to the United States. Defendants have moved to have this claim dismissed as a matter of law arguing that because Ivan Andrick was not terminated but rather that he voluntarily resigned, he cannot state a claim for wrongful termination.

The Texas Supreme Court in 1985 recognized an exception to the at-will employment doctrine: wrongful termination for refusal to commit an illegal act. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1993). However, as Andrick was not terminated from the position in Tunisia but resigned from that position, he cannot as a matter of law pursue a cause of action for wrongful termination. Thus, this cause of action should be dismissed. Based on the foregoing, the Court hereby

ORDERS the following:

(1) the motion for leave to file motion for summary judgment in excess of the page limits (Document #39) is GRANTED;

(2) the motion for summary judgment (Document #40) is GRANTED; and

(3) the motion for judgment on the pleadings (Document #69) is GRANTED.

SIGNED at Houston, Texas, on this 31 day of May, 1995.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
FILED
JAN 18 1996
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450
Summary Calendar

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, CO.; R. G. HALE,
Defendants-Appellees,

and

LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-94-CV-893

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:*

Appellants Ivan and Helen Andrick appeal from the district court's order denying their lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. § 621, and various state theories, including fraud, intentional infliction of emotional distress, and constructive discharge. They argue that the district court erred in evaluating their claims and in applying federal and state law. We have reviewed the record and the magistrate judge's report and recommendation and find no reversible error. Accordingly, we affirm for essentially the reasons given in the district court's order granting the defendant's motions for summary judgment and for judgment on the pleadings. *Andrick v. Pool Energy Services, Co., et al.*, No. H-94-983 (S.D. Tex. June 1, 1995).

Appellants' motion to file a reply brief out-of-time is DENIED and appellees' motion to strike the proposed reply brief is GRANTED.

AFFIRMED.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20450

IVAN ANDRICK; HELEN ANDRICK,
Plaintiffs-Appellants,

versus

POOL ENERGY SERVICES, CO.; R. G. HALE,
Defendants-Appellees,

and

LOUIS E. DUPREE,
Defendant.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(February 22, 1996)

Before WIENER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

_____

ROBERT M. PARKER
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE